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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 803

MRS. KATIE LYONS BYRD,
Petitioner,

versus

THE NAPOLEON AVENUE FERRY COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the District Court (printed in the Transcript of the Record at page 386, *et seq.*) is reported in 125 F. Supp. 573. The opinion of the Court of Appeals for the Fifth Circuit (App., page 1 of Petition) consists

of a one-sentence *Per Curiam* affirming the District Court on its opinion, and is reported in 227 F.2d 958 (CA 5 1955).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

In adjudicating an action brought under state law for wrongful death occurring upon navigable waters, may an admiralty court, in enforcing that law, disregard the state substantive defense of contributory negligence as a complete bar to recovery and apply, instead, the general maritime law of apportionment of damages?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent part of Article 3, Section 2 of the Constitution of the United States, granting to the United States judicial power over all cases of admiralty and maritime jurisdiction, is set forth on page 3 of the petition. Pertinent statutory provisions are the Act of June 25, 1948, § 646, 62 Stat. 931, as amended May 24, 1949, c. 139, § 79, 63 Stat. 101 (28 U.S.C. 1333); the Act of March 30, 1920, c. 111, 41 Stat. 537 (46 U.S.C. 761-767);

commonly known as the "Death on the High Seas Act"; the Act of February 1, 1928, c. 15, 45 Stat. 54 (16 U.S.C. 457); and Article 2315, Revised Civil Code of La.; the relevant part of which are quoted in the Appendix hereto.

STATEMENT OF THE CASE.

This is a libel *in personam* filed by Petitioner, the widow of Merrill Byrd, who was drowned when a vehicle driven by himself in company of his wife, drove into the Mississippi River in debarking from a ferry operated by the Respondent. Alleging that the accident was caused by the negligence of Respondent, Petitioner claimed damages both for her own injuries and for the death of her husband. The District Court allowed damages in the amount of $10,000 for Petitioner's own personal injuries, but found that the contributory negligence of her deceased husband defeated any claim which she might otherwise have had for his death. (Opinion, R. 396-397.)

Respondent herein took a timely appeal from said judgment of the District Court to the Court of Appeals for the Fifth Circuit, assigning as errors the lower Court's findings that Respondent's ferry and landing facilities were unsafe and negligently maintained, that Petitioner's own contributory negligence did not bar her recovery, and that damages in the amount of $10,000 were actually suffered by Petitioner. (R. 398-404.) Petitioner cross-appealed on that part of the District Court's decree which denied her recovery for the death of her husband.

In a one-sentence *per curiam* opinion, the Court of Appeals for the Fifth Circuit affirmed the District Court on the basis of its written opinion.

ARGUMENT.

The basis for Petitioner's claim for damages for the wrongful death of her husband is found in La. Rev. Civil Code, Article 2315. If any cause of action is to be recognized at all, it must necessarily have its basis in Louisiana law because this Court unequivocally declared some 70 years ago that the maritime law, following the course of the common law unmodifie dby statute, recognized no right of action in the representatives of a person wrongfully killed. *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886).

The issue here, simply stated, is whether an admiralty court must apply a state death statute *cum onere*, or whether such court, deciding that the liability created by the state statute is cognizable by it, may thereafter revert to the general admiralty law to determine the nature or extent of that liability, or whether there are any defenses to the liability. It is believed that Petitioner would agree that if the same state statute creating the liability includes also a provision placing a limitation upon the liability, or establishing a defense thereto, the limitation adheres to the liability and must be applied along with it. See *The Corsair*, 145 U.S. 335, 12 S.Ct. 949, 36 L.Ed. 727 (1892). It is not understood that

Petitioner would draw any distinction between a statutory limitation or defense comprising a part of the wrongful death statute itself, and such a limitation or defense found in a separate statute. See, for example, *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S. Ct. 89, 66 L.Ed. 210 (1921).

The question then may be narrowed to whether a legal distinction can logically be drawn between a limitation of, or defense to, the liability of the wrongful death statute based upon a state statute and one based upon the decisional law of the state. In either case, if the limitation or defense is a *real* or *substantive* one which bears directly upon the nature of the liability, such limitation or defense adheres to the liability and cannot be divorced from it.

Petitioner would avoid consideration of the real nature of the defense of contributory negligence as applied by the Louisiana courts by characterizing the wrongful death action itself as merely being a *remedy* for a pre-existing right rooted in the general maritime law, *viz.*, to receive redress for maritime torts. Following the passage of Lord Campbell's Act in England the courts of that country promptly recognized that an entirely new *right* had been introduced into the existing legal system, one which gave "to the personal representatives a cause of action beyond that which the deceased would have if he had survived, and based on a different principle. . . ." *Pym v. Great Northern Railway Co.*, 4 B & S 396, 122 Eng. Reprint 508 (1863). A few years after the adoption af Lord Campbell's Act the Supreme Court

of Louisiana, likewise, recognized and expressed a full appreciation of the nature of the wrongful death action, and that it represented a significant departure from long recognized rights of person and property. The Court accordingly rejected a demand for damages for wrongful death, stating that in the absence of "a special statute authorizing such actions, they cannot be maintained." *Hubgh v. New Orleans & Carrollton R. Co.*, 6 La.Ann. 495, 496 (1851).

Before *Hubgh v. New Orleans & Carrollton R. Co.*, La. Civil Code Article 2315 (then 2294) simply gave a right of action to the injured to recover for wrongs committed by others. By an Act of 1855, the Article was amended to provide for the survival of this right of action in case of the death of an injured party. Later, in 1884, the Article was again enlarged to give the survivors a separate action for the injuries suffered by them by virtue of the wrongful death. Contributory negligence as a complete bar to recovery under the said codal Article was well established in the law of Louisiana at the time of the 1855 amendment. *Fleytas v. Pontchartrain R. Co.*, 18 La. 339, 36 Am. Dec. 658 (1841). That contributory negligence of the deceased bars recovery in the survivors is likewise deeply entrenched in the law of this state. See, *Vitale v. Checker Cab Co.*, 166 La. 527, 117 So. 579 (1928).

The only wrongful death actions existing under the maritime law are those expressly created by statute. For example, the "Death on the High Seas Act," 46 U.S.C. 761 *et seq.*, provides redress for deaths occurring on the high seas, but expressly reserves to each state the power to

provide an action for wrongful death as to its own navigable waters. The implication necessarily to be drawn from this reservation is that the Congress specifically intended not to exercise its Constitutional power to provide for a single uniform action for deaths occurring upon navigable waters within the territorial limits of the several states. Any wrongful death action created by a state and employed in the Federal admiralty court as a supplement to the general maritime law should, therefore, be interpreted and applied as have the State Courts themselves. Otherwise, the State action would not be recognized and applied, but rather an action which is entirely foreign and unknown to the State.

The District Court below was therefore pre-eminently correct when it said in its opinion, "Here the very right to recover itself, rooted in state law, is being used as a supplement to the general maritime law and not as a remedy to enforce a pre-existing right rooted in the general maritime law." (Opinion, R. 392.)

1. The Decision Below is Clearly Correct.

Although the early decisions of this Court in cases such as *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), and *The Alaska*, 130 U.S. 201, 93 S.Ct. 461, 32 L.Ed. 923 (1889), suggested that in an appropriate case recovery would be allowed the survivors of the deceased for the latter's wrongful death on the basis of a state statute, it appears that *The Hamilton*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907) was the first case in which such recovery was actually allowed. In the same term

that *The Hamilton* was decided, this Court also allowed recovery to the survivors of certain passengers drowned as the result of the collision and sinking of a French vessel on the high seas, such recovery being based upon the French law recognizing the wrongful death action, *La Bourgogne*, 210 U.S. 95, 28 S.Ct. 664, 52 L.Ed. 973 (1908).

The power of the Federal Government under the Constitution to establish a right of action for wrongful death occurring on the navigable waters within the various states is hardly open to challenge. Furthermore, if the Federal Government had elected to enact a wrongful death statute in favor of persons in the status of Petitioner, the duty would plainly rest upon both the Federal and State Courts in applying the statute to give faithful recognition to all its substantive aspects as a federal maritime cause of action. The state courts would lack authority to apply local rules at variance with the controlling federal law where such local rules affected the substantial rights of the parties. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942).

However, Congress over the years has apparently considered that the wrongful death actions established by the various states, as supplements to the general maritime law, furnish an adequate remedy to personal representatives of individuals other than seamen negligently killed upon the navigable waters of such states. State death statutes are bound to vary in their terms establishing the liabilities created thereby; in the designa-

tion of beneficiaries eligible to recover; in the limitation of time for enforcing the rights of action; and in the defenses applicable thereto, whether statutory in nature or founded upon the common law as expressed in the jurisprudence of the state. Nevertheless, this Court and the lower Federal courts have seen fit consistently to apply the state death statutes fully and literally in accordance with their terms and the jurisprudence of the states in which the statutes originated.

In *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921), a widow and children began an admiralty suit in personam under a California wrongful death statute to recover for the death of their stevedore husband and father who was killed while working in the hold of a vessel under charter to Western Fuel Company. The defense was urged that the action, having been commenced slightly over a year from the date of death, was barred by the one year limitation period set forth in the California Code of Civil Procedure. This Court declared that admiralty courts could entertain the libel based upon the state statute because, "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. . ." (257 U.S., at 242) The state statute of limitation was held to have defeated the claim.

Petitioner's entire argument is based upon *dictum* appearing in the opinion written by Mr. Justice Black as the organ of this court in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), and upon further *dictum* in the subsequent case of *O'Leary v. United States Lines Co.*, 215 F.2d 708 (CA 1 1954). In this connection it is observed that Petitioner, on page 15 of her brief, erroneously refers to these *dicta* as holdings. Further support for Petitioner's argument is sought from the incongruity which results when a person merely injured is allowed to recover despite his own contributory negligence, whereas no recovery is allowed for the same injury if death occurs. The meaning which Petitoner and the majority opinion in *O'Leary* attaches to the dictum in *Pope & Talbot* is manifestly incorrect when the language of *Pope & Talbot* is considered in the light of the facts of that case and other decisions of this Court and of the courts of appeals. (See criticisms of O'Leary's dictum at 7 Stan. L.Rev. 261, 41 Va. L.Rev. 251, 23 Geo. Wash. L.Rev. 601, and 68 Harv. L.Rev. 1266.)

It is particularly noteworthy that the language which Petitioner quotes from *Pope & Talbot* in her brief (p. 14) concludes with a citation of *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942). The opinion in *Garrett*, as in *Pope & Talbot*, was authored by Mr. Justice Black and is therefore of special significance to us here. In explaining the Court's ruling that a state court, in trying a case brought under the Jones Act, must proceed in such a manner that all of the sub-

stantial rights of the parties under controlling federal law are protected, Mr. Justice Black therein states:

> ". . . The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. . . ." (317 U.S. at 245.)

In the light of the foregoing expression it would have been inconsistent for this Court in *Pope & Talbot*, decided a decade later, to have concluded that the federal maritime rule of mitigation of damages rather than the State rule of contributory negligence would apply in a situation such as is now under consideration, where a state created right of action wholly unknown to the admiralty law (although not repugnant thereto in its general features) is being enforced. However, even stronger support for the application of the Louisiana doctrine of contributory negligence in this instance can be found in *Levinson v. Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953), which was decided the same year as *Pope & Talbot*. The question for consideration there was whether a decedent's administrator, suing in admiralty under the

Kentucky wrongful death statute, could amend his pleadings after the State one year limitation period had expired to cure a defective appointment as ancillary administrator in Kentucky. In holding that the *amendment* could be made although not permissible under *state practice* after the limitation period, this Court used language which falls far short of suggesting that a *substantive* defense, such as contributory negligence, would not have defeated the action:

> ". . . Like the Garcia suit, the present libel was brought under a State wrongful death statute. Ky. Rev. Stat., 1946, Sec. 411.130. As we held in Garcia, a time limitation deemed attached to the right of action created by the State is binding in the federal forum. The Harrisburg, supra (119 US, at 214). Similarly, when the statute, as it does in this case, vests the right of action in 'the personal representative of the decedent', it is not for the forum provided by another jurisdiction to vest the right elswhere; such a forum must look to the local law to determine the meaning of the phrase 'personal representative.' But the narrow question here is whether such a forum, accepting and enforcing the limited scope given to the right by the local law which created it, must also be bound by the dubious and perhaps conflicting intimations on elegantia juris to be found in local decisions, whether, that is, a federal court is imprisoned by procedural niceties relating to amendments of pleadings.
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> ". . . In the absence of congressional action, the court adopted and enforced the obligatio created by Kentucky as it would one originating in any foreign jurisdiction. La Bourgogne (Deslions v. La Com-

> pagnie Generale Transatlantique) 210 US 95, 138, 52 L.Ed. 973, 993, 28 S.Ct. 664; The Hamilton (Old Dominion S.S. Co. v. Gilmore) 207 US 398, 405, 52 L.Ed. 264, 270, 28 S.Ct. 133. And it was bound to enforce it as it found it, but not bound beyond that to strive for uniformity of results in procedural niceties with the courts of the jurisdiction which originated the obligatio." (345 U.S. at 650-652.)

Moreover, as was pointed out by the District Judge below, whose opinion was adopted by the Court of Appeals, to accept the interpretation of *Pope & Talbot* which Petitioner here urges would be to overrule by *dictum* not only the import of Mr. Justice Black's earlier opinion in *Garrett*, but also the uniform jurisprudence of this Court and the Courts of Appeal. The cases cited by the District Judge specifically recognizing the state rule of contributory negligence as controlling the disposition of an action for wrongful death occurring upon the navigable waters of the state establishing the right of action are: *O'Brien v. Luckenbach S.S. Co.*, 293 F. 170 (CCA 2 1923); *Klingseisen v. Costanzo Transp. Co.*, 101 F.2d 902 (CCA 3 1939); *Robinson v. Detroit & C. Steam Nav. Co.*, 73 F. 883 (CCA 6 1896); *Feige v. Hurley*, 89 F.2d 575 (CCA 6 1937); *Truelson v. Whitney & Bodden Shipping Co., Inc.*, 10 F.2d 412 (CCA 5 1926); and *Graham v. A. Lusi, Ltd.*, 206 F.2d 223 (CA 5 1953).

Finally, to apply the State wrongful death statute in its substantive aspects at variance with the jurisprudence of the state would be in direct violation of an Act of Congress which specifically directs that an action, brought to recover damages for wrongful death occurring at a place subject to the exclusive jurisdiction of the

United States and within the boundaries of a state, will be governed by the law of the state. 16 U.S.C. 457. *Puleo v. H. E. Moss & Co.*, 159 F.2d 842 (CCA 2 1947).

2. There is No Real Conflict of Decision.

Petitioner urges that the Courts below, in holding that her claim for the death of her deceased husband is defeated by his contributory negligence, have reached a result which is in conflict with doctrines and rules established by this Court and have decided an important question of law "in direct and *acknowledged conflict*" with the First Circuit.

The fountainhead of the asserted conflict is in certain language found in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), specifically in the statement: "Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling." (346 U.S. at 409.) It is submitted that the quoted language is clear, when considered in context and in the light of other decisions of this Court and the Courts of ppeals, and that only a strained construction can give it the meaning assigned to it by Petitioner. Moreover, the language was not necessary to the decision of the case and therefore, as *dictum*, does not merit review and further explanation at this time by this Court.

The particular circumstances in *Pope & Talbot* were these: Hawn was injured (not killed) over navigable waters in Pennsylvania while employed as a carpenter by an independent contractor on Pope & Talbot's ship.

Hawn filed a civil action to recover for his injuries, claiming that they resulted from the vessel's unseaworthiness and from Pope & Talbot's negligence. Pope & Talbot urged before this Court that the jury finding of contributory negligence should have been accepted by the trial court as a complete bar to Hawn's recovery. This Court, however, found that no claim had been made under Pennsylvania law, and that Hawn's right of action was "rooted in federal law" which recognized apportionment of damages. The Pennsylvania law of contributory negligence was accordingly found to be inapplicable to the case. Pope & Talbot's argument that the *Erie-Tompkins* rule should apply was likewise rejected.

Since Hawn's right of action was "rooted in federal maritime law," it was established doctrine that all his substantial rights must be decided in accordance with such federal maritime law, even though the state might have furnished the remedy for enforcement of this federal right by making available its courts under the Savings clause of the Judiciary Act of 1789, as amended. 28 U.S.C. 1333. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942). Moreover, the state could not deprive him of these rights by enacting legislation in this area where the federal control was paramount. Likewise, his federally created rights would not be defeated by the mere fact that his lawyer filed the action on the civil side rather than the admiralty side of the court. It is conceded that *Pope & Talbot* represents authority for these principles, but the case does not purport to affect the question of whether federal substantive law applies where the very basis, *and only basis*,

for the right of action is a state statute which serves as a supplement of the federal maritime law by filling a void not covered thereby.

In *O'Leary v. United States Lines Company*, 215 F.2d 708 (CA 1 1954), likewise, the court was not called upon to decide whether a wrongful death action based upon a state statute would be barred by the state law of contributory negligence. The two judges constituting the majority of the court concluded that the plaintiff's deceased husband was free from negligence contributing to his own death, and therefore expressly acknowledged that their remarks on the effect of contributory negligence upon recovery represented *dictum*:

> ". . . In this case, however, we do not, and indeed we cannot except by dictum, pass upon the question of the law applicable to count one. The reason for this is that we do not see how on the evidence a finding of the defendant's causal negligence could reasonably be made under either local or maritime law. Wherefore we do not reach the question of contributory negligence wherein local and maritime law differ radically in that under the former such negligence provides a complete defense whereas under the latter it serves only to mitigate damages. Pope & Talbot v. Hawn, supra (216 F.2d at 712). . . ."

3. No Important Question of Federal Law is Presented.

The principles involved in the question presented herein and necessary to its proper resolution have already received extensive consideration by the Supreme Court. Although it does not appear that this Court has dealt

with contributory negligence as a defense to a wrongful death action based upon a state statute, it has held other substantive defenses of the State to be controlling upon the admiralty courts when enforcing state rights. Furthermore, no distinction has ever been drawn by this Court between a substantive defense set forth in a statute and one which has its basis in the common law of the state, and from the standpoint of logic there is no reason why it should have done so, for in either case the substantive defense adheres to the right itself and functions as a limitation upon that very right. Were there considerable doubt as to the nature of the defense urged in this case, *i.e.*, whether contributory negligence is a substantive defense or merely a "procedural nicety" established for the orderly prosecution of a substantive right, a different case would be made out. See *Levinson v. Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953).

Petitioner places considerable emphasis upon the incongruity which would be permitted to exist in a case such as this if the doctrine of mitigation of damages is applied to a person injured, and that of contributory negligence as a complete bar to another person killed in the same accident. However, as was pointed out by Judge Hartigan, dissenting in *O'Leary v. United States Line Company*, 215 F.2d 708 (CA 1 1954), the same incongruity would result as between a maritime and non-maritime action based on a state death statute if the general maritime law determined the nature of the liability in the former class of action and the state law of contributory negligence in the latter. In any event, as this Court itself stated in its opinion in *The Harrisburg*,

119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), "It is the duty of courts to declare the law, not to make it. . ." (119 U.S. at 214.)

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April ...., 1956.

APPENDIX.

Title 28, Chapter 85.—District Courts; Jurisdiction (28 U.S.C. 1331, *et seq.*)

* * *

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled . . . . June 25, 1948, c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, Sec. 79, 63 Stat. 101.

Title 46, Chapter 21.—Death on the High Seas by Wrongful Act (46 U.S.C. 761-768)

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine mile from the shore of any State. . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty . . . against the vessel, person, or corporation which would have been liable if death had not ensued. Mar. 30, 1920, c. 111, Sec. 1, 41 Stat. 537.

* * *

§ 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly. Mar. 30, 1920, c. 111, Sec. 6, 41 Stat. 537.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to . . . any waters within the territorial limits of any State . . . Mar. 30, 1920, c. 111, Sec. 7, 41 Stat. 538.

Title 16, Chapter 1.—The National Parks, Military Parks, Monuments, and Seashores (16 U.S.C. 457)

* * *

§ 457. Action for death or personal injury within national parks or other place under jurisdiction of United States; application of State laws

In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of

injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be. Feb. 1, 1928, c. 15, 45 Stat. 54.

Article 2315, Rev. Civil Code of Louisiana (LSA—CC, Art. 2315)

Art. 2315. Liability for acts causing damage; survival of action

Art. 2315. Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, . . . or spouse of the deceased, or either of them, . . . for the space of one year from the death. . . .

* * *

The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be. (As amended by Acts 1948, No. 333, Sec. 1.)